BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

IRENE PITT	)	
Claimant	)	
VS.	)	
	)	Docket No. 245,402
THE BOEING COMPANY	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY	)	
STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the February 7, 2002 Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on August 16, 2002, in Wichita, Kansas.

APPEARANCES

W. Walter Craig of Wichita, Kansas, appeared for claimant. Frederick L. Haag of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant filed this claim alleging a period of accidental injuries to both upper extremities, the neck, and back from on or about February 15, 1999, and each and every day worked after that date. In the February 7, 2002 Award, Judge Clark determined the appropriate date of accident for this alleged series of mini-traumas was October 18, 1999, which was claimant's last day of working for respondent. Averaging a 69 percent wage

loss and a 61 percent task loss, the Judge awarded claimant benefits for a 65 percent permanent partial general disability.

Respondent and its insurance carrier contend Judge Clark erred. They argue the Judge erred in disregarding the task loss opinion provided by Dr. Philip R. Mills that was based upon Karen Crist Terrill's work task analysis. Accordingly, they argue the Judge should have computed claimant's ultimate task loss percentage by considering and averaging in the 10 percent task loss percentage provided by Dr. Mills. Respondent and its insurance carrier argue claimant's task loss is only 37 percent. Therefore, they request the Board to reduce claimant's permanent partial general disability from 65 percent to 52.25 percent.

Conversely, claimant requests the Board to affirm the Award. Claimant argues the Judge properly rejected the task loss opinion provided by Dr. Mills that was based upon Ms. Terrill's task analysis.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. Claimant began working for respondent in approximately August 1997. As a sheet metal assembler, claimant riveted, bucked rivets, and drilled. In her job, claimant often used hand and power tools.

2. Approximately six months before February 1999, claimant developed symptoms in her neck, arms, and wrists. Claimant initially sought treatment from her family physician but eventually, after reporting her symptoms to respondent, saw Dr. J. Mark Melhorn, who operated on both wrists and elbows. Dr. Melhorn performed a right carpal tunnel release and right ulnar cubital release in October 1999 and a left carpal tunnel release and left ulnar cubital release in November 1999. Later, claimant treated with a Dr. Estivo for left shoulder and neck complaints, receiving a cortisone injection in the left shoulder and approximately eight weeks of physical therapy.

3. Claimant testified her last day of working for respondent was approximately October 18, 1999, as she did not return to work for respondent after completing her medical treatment. Instead, claimant drew unemployment benefits and in August 2000 began training at Wichita Area Technical College.

4. When she testified at the October 15, 2001 regular hearing, claimant had recently completed a computer-aided drafting course and was working on completing her associate's degree, which she expected to complete by August 2002. As claimant attended evening classes, she looked for employment during the day.

5. One of claimant's attorneys hired Dr. Philip R. Mills to evaluate claimant and provide expert opinions for this claim. The doctor saw claimant on July 20, 2000, and diagnosed bilateral carpal tunnel syndrome and bilateral epicondylitis with mild residual symptoms following surgery. Using the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, the doctor rated claimant as having a 13 percent whole body functional impairment.

6. Dr. Mills believes claimant should be restricted from performing more than medium level work as she should not lift or carry more than 50 pounds, not lift or carry more than 25 pounds on a frequent basis, and limit using power and vibratory tools to only four to six hours per eight-hour day.

7. Reviewing the task analysis prepared by human resources consultant Jerry Hardin, Dr. Mills indicated that he agreed with Mr. Hardin's analysis that claimant had lost the ability to perform 57 to 58 percent of the work tasks that she performed in the 15-year period before her present injuries. But Mr. Hardin testified at his deposition that his list of 35 former work tasks included eight tasks that were duplicates. The Board has computed Dr. Mills' task loss opinion after removing those eight duplicate tasks from consideration. With that adjustment, Dr. Mills' opinion is that claimant has lost the ability to perform 16 tasks out of a total of 27 tasks, which produces a task loss percentage of 59 percent.

8. The Board must, however, make a further adjustment in Dr. Mills' task loss opinion. Respondent and its insurance carrier hired vocational counselor Karen Crist Terrill to prepare a task analysis of claimant's former work tasks. While doing her task analysis, Ms. Terrill discovered that claimant had worked at two employers that Mr. Hardin did not include in his analysis. In addition to the employers considered by Mr. Hardin, Ms. Terrill learned that claimant had also worked at a Casey's General Store and for Burns International Securities during the 15-year period before she sustained these injuries. At Casey's General Store, claimant worked as a crew person/assistant manager, which Ms. Terrill broke down into 10 different tasks. Likewise, Ms. Terrill divided claimant's job as a guard for Burns International Securities into three separate work tasks. Because there is no evidence in the record that claimant has lost the ability to perform any of those 13 work tasks, the Board further adjusts Dr. Mills' task loss opinion and finds that claimant has lost the ability to perform 16 out of a total of 40 tasks, which produces a task loss of 40 percent.

9. Another one of claimant's attorneys hired Dr. Pedro Murati to evaluate claimant and provide expert opinions in this claim. The doctor saw claimant on April 26, 2001, and

diagnosed bilateral hand/wrist pain with residual symptoms following bilateral carpal tunnel releases, bilateral elbow pain with residual symptoms following bilateral ulnar cubital releases, and myofascial pain syndrome affecting the neck, both shoulder girdles and the upper thoracic paraspinals. The doctor rated claimant as having a 28 percent whole body functional impairment, which included ratings for the myofascial pain syndrome in the neck, lost range of motion in the cervical spine, lost range of motion in the thoracic spine, and lost range of motion in the left shoulder.

10. Dr. Murati believes claimant should be restricted from heavy grasping, working over the shoulder level more than only occasionally, repetitively gripping or grasping more than only occasionally, lifting or carrying more than 20 pounds, lifting up to 20 pounds more than only occasionally, and lifting up to 10 pounds more than frequently. Moreover, the doctor would restrict claimant from using all vibratory tools, hooks and knives, and restrict claimant from working in awkward positions or working and reaching more than 18 inches from her body.

11. Reviewing the task list initially prepared by Mr. Hardin, Dr. Murati testified he agreed with Mr. Hardin's analysis of the claimant's task loss due to this work-related injury. But, as indicated above, that analysis should be modified by excluding the eight duplicate job tasks included in Mr. Hardin's list and by adding the 13 job tasks that Mr. Hardin did not include in his list. Making the first adjustment to exclude the eight duplicate tasks, Dr. Murati's task loss percentage is 63 percent, which represents a loss of 17 out of 27 former tasks. Making the second adjustment to include the 13 work tasks from the Casey's General Store and the Burns International Securities jobs, Dr. Murati's task loss percentage is approximately 43 percent, which represents a loss of 17 work tasks out of 40 total tasks.

12. The Board finds the 40 percent and 43 percent task loss percentages more accurately reflect claimant's task loss as opposed to the task loss percentage that Dr. Mills provided when he considered Ms. Terrill's analysis as that analysis did not consider the manner in which the tasks were actually performed. When a doctor's work restrictions and limitations are based upon a period of time that a worker should perform a specific physical activity, all of the tasks performed in that job should be considered in the aggregate to accurately determine what tasks have been eliminated.

13. Considering the entire record, the Board finds the 40 percent and 43 percent task loss percentages are the most accurate. Accordingly, the Board concludes claimant has sustained an approximate 42 percent task loss due to the injuries that she sustained while working for respondent through October 18, 1999.

14. Claimant has a 100 percent wage loss through November 19, 2001. After that date, claimant has a 70 percent wage loss. Those findings are based upon the parties' written

stipulation that claimant's average weekly wage for an October 8, 1999 accident was $830.77. That is the best evidence for claimant's average weekly wage as of her last day of work on approximately October 18, 1999. When claimant testified at a hearing in December 2001, she had found a job through a temporary employment agency. According to claimant, on approximately November 20, 2001, she began working at Wescon Products doing light assembly, putting together throttles for lawn mowers. Claimant was earning $6.25 per hour, working 40 hours per week, but she was not receiving any fringe benefits. Accordingly, claimant's post-injury average weekly wage commencing November 20, 2001, is $250 per week. Before November 20, 2001, claimant was unemployed and, therefore, earning no wages. But as of November 20, 2001, claimant began earning $250 per week, which is 70 percent less than her stipulated pre-injury average weekly wage.

CONCLUSIONS OF LAW

The Award should be modified. Claimant is entitled to receive permanent partial general disability benefits for a 71 percent work disability through November 19, 2001, followed by a 56 percent permanent partial general disability.

Because claimant's injuries comprise an "unscheduled" injury, her permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[1] and *Copeland*.[2] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as

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[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the worker's post-injury ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[3]

The Board concludes claimant made a good faith effort to find appropriate employment after recovering from her injuries. Accordingly, claimant's actual wages should be used in determining her permanent partial general disability.

Averaging the 100 percent wage loss with the 42 percent task loss, claimant has a 71 percent permanent partial general disability through November 19, 2001. But commencing November 20, 2001, claimant has a 56 percent permanent partial general disability, which is an average of the later 70 percent wage loss and the 42 percent task loss.

The Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the February 7, 2002 Award, as follows:

Irene Pitt is granted compensation from The Boeing Company and its insurance carrier for an October 18, 1999 accident and resulting disability. Based upon an average weekly wage of $830.77, Ms. Pitt is entitled to receive 11.86 weeks of temporary total disability benefits at $383 per week, or $4,542.38.

For the period through November 19, 2001, 97.14 weeks of benefits are due at $383 per week, or $37,204.62, for a 71 percent permanent partial general disability.

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[3] *Copeland*, at 320.

For the period commencing November 20, 2001, 135.26 weeks of benefits are due at $383 per week, or $51,804.58, for a 56 percent permanent partial general disability and a total award of $93,551.58.

As of September 16, 2002, claimant is entitled to receive 11.86 weeks of temporary total disability compensation at $383 per week in the sum of $4,542.38, plus 140.14 weeks of permanent partial general disability compensation at $383 per week in the sum of $53,673.62, for a total due and owing of $58,216, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $35,335.58 shall be paid at $383 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant
Frederick L. Haag, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation